SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ARTHUR T. LANE, KENNETH GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated, Plaintiffs, v. THE CITY OF SEATTLE, Defendant.	CLASS ACTION NO. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES RE SPU

I. PARTIES

1. Plaintiff Arthur T. Lane was born and raised in Seattle and has resided in Seattle throughout the relevant time period. He was graduated from the University of Washington Law School in 1957 and served as an assistant city attorney for Seattle for over 30 years, until he retired in 1988.

2. Plaintiff Kenneth Gorohoff has resided in Seattle throughout the relevant time period. He worked for the Boeing Company from 1966 to 1972, for the Washington Human Rights Commission from 1972 to 1978, and for Seattle City Light from 1978 to 1983. He was an independent paper distributor from 1983 to 2002, and since 2002 has been an

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owner and principal of Research Audio Development Company in Seattle, selling audio systems and related technical equipment.

3. Plaintiff Walter L. Williams received a Bachelor of Science degree in Electrical Engineering from North Carolina A & T State University in 1960. He worked as an electrical engineer for The Boeing Company from 1961 to 1970 and then went to law school at the University of Washington, receiving his Juris Doctor degree in 1973. From 1974 until he retired in March 2000, he served as an assistant city attorney for Seattle, representing the City Light Department almost exclusively for 26 years. He resided in Seattle from 1961 until 2003, when he moved to South Carolina.

4. Plaintiffs Lane and Gorohoff are ratepayers of Seattle Public Utilities ("SPU"), and plaintiff Williams was a ratepayer of SPU until 2003. All of the plaintiffs have paid to SPU all amounts charged to them by SPU. Plaintiffs pay or paid for SPU utility services based on rates set by defendant The City of Seattle ("Seattle" or the "City").

5. Each of the named plaintiffs is well qualified to represent the interests of the class described below. In an action in this Court entitled *Okeson v. City of Seattle*, No. 02-2-05774-8SEA, asserting certain claims on behalf of Seattle City Light ratepayers that are analogous to claims asserted in this action on behalf of SPU ratepayers, plaintiffs Lane and Williams, along with two other persons, were appointed by this Court as representatives of the class of all persons who are or were at any time since December 24, 1999 ratepayers of Seattle City Light, excluding The City of Seattle itself. The claims asserted in this action are analogous to certain of the claims asserted in the *Okeson* action, as more fully described below.

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6. The named plaintiffs bring this action on behalf of themselves and the class of all persons similarly situated. The class consists of all persons who are or were at any time since March 1, 2002 ratepayers of SPU, excluding the defendant City itself.

7. Defendant The City of Seattle ("Seattle" or "the City") is a municipal corporation and a first class city organized under the laws of the State of Washington. It is located in King County, Washington. Seattle owns and operates SPU as a proprietary public utility. SPU provides water and other utility services to plaintiffs and other customers. The City is required to manage and operate SPU, as a proprietary municipal utility, in a way that is in the best interest of SPU's ratepayers and not as a means of raising revenues for the City's general governmental purposes.

II. SEATTLE HAS ILLEGALLY REQUIRED SPU WATER RATEPAYERS TO PAY FOR FIRE HYDRANTS AND OTHER GENERAL GOVERNMENTAL FUNCTIONS

8. Throughout the relevant time period, the City has required SPU to provide fire hydrant service within Seattle, including installation and maintenance of fire hydrants and the piping serving them, as well as water used for operation and maintenance of the fire hydrant system and other non-utility public uses such as street cleaning, without compensating SPU for the costs of providing those services. The costs of the fire hydrants and water for non-utility public uses have instead been imposed on and paid by SPU water ratepayers through rates.

9. In *Okeson* the Washington Supreme Court unanimously held that providing streetlights was a general governmental function rather than a function of a municipally-owned proprietary utility and that Seattle could not lawfully charge streetlight costs to

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electric utility ratepayers as a part of electricity rates. The Court also held that imposing streetlight costs on electric ratepayers constituted an unlawful tax on ratepayers.

10. The City had argued in its brief to the Supreme Court that imposing streetlight costs on Seattle's electric ratepayers should be treated the same as imposing the costs of fire hydrants on water ratepayers, as the City had been doing for many years, stating in its brief that "No reasoned analysis can ignore the parallels between providing streetlights and fire hydrants." (Seattle Brief at 17).

11. The Washington Supreme Court rejected that argument, explaining that:

> Providing streetlights . . . is a governmental function because they operate for the benefit of the general public, and not for the "comfort and use" of individual customers. City Light customers have no control over the provision or use of streetlights. Hence, while the electric utility itself is a proprietary function of government, the maintenance of streetlights is a governmental function. . . .
>
> . . . Seattle further contends that the cost to maintain fire hydrants is also a governmental function, yet that cost has been paid by water ratepayers. Br. of Resp'ts at 17-21. The fire hydrant issue is not before us, and the mere fact that fire hydrant costs have been included in the water rate (and never been challenged) does not determine the issue of payment for streetlights, presented here.

Okeson, 150 Wn.2d at 550-551.

12. As the City had argued vigorously in *Okeson*, there can be no more fundamental governmental purpose than protecting people and property against fire. (Seattle Brief at 17). This is a general governmental purpose, not a function of a proprietary utility.

13. The Washington Supreme Court's reasoning as to streetlights is equally applicable to fire hydrants:

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> Providing [fire hydrants] . . . is a governmental function because they operate for the benefit of the general public, and not for the "comfort and use" of individual customers. [SPU] customers have no control over the provision or use of [fire hydrants]. Hence, while the [water] utility itself is a proprietary function of government, the maintenance of [fire hydrants] is a governmental function. . . .

Okeson, 150 Wn.2d at 550-551 (quoted above, but substituting "fire hydrants" for "streetlights," "SPU" for "City Light" and "water" for "electric").

14. Requiring SPU and its water ratepayers to bear the costs of fire hydrants and water for other non-metered public uses illegally imposes on them general governmental costs that properly should be borne by the City's general fund rather than by SPU and its ratepayers.

15. Requiring SPU and its water ratepayers to bear the costs of fire hydrants and water for other non-utility public uses constitutes the unlawful imposition of a hidden tax on the ratepayers.

16. The City's failure to compensate SPU for providing fire hydrants and water for other non-utility public uses constitutes a violation of the local government accounting statute, RCW 43.09.210, which (1) requires the City to pay SPU for the "true and full value" of any property or service provided by SPU to the City and (2) prohibits the City from benefiting "in any financial manner whatever" by an appropriation or fund made for the support of SPU.

III. SEATTLE HAS ILLEGALLY REQUIRED SPU RATEPAYERS TO PAY FOR GENERAL GOVERNMENTAL ART PURPOSES THROUGH THE "1% FOR ART" PROGRAM

17. SPU is required to contribute funds to the City's Public Art program run by the

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Office of Arts and Cultural Affairs (formerly Seattle Arts Commission), through the City's One Percent For Art ordinance, Seattle Municipal Code Ch. 20.32, adopted in 1973. Under this ordinance, SPU is required to contribute to Seattle's Municipal Arts Fund one percent each year of the utility's capital improvement budget for construction within Seattle city limits. The Municipal Arts Fund, under the direction of the Office of Arts and Cultural Affairs, spends money to support Seattle's Public Art program to integrate art work and artists' visions into public settings, expand the public's experience with visual art, and create enduring public art projects.

18. Much of the money paid by SPU under the 1% for Art program was spent on art purchases or art projects with a general governmental purpose, rather than a legitimate utility purpose, and was spent to benefit the general public, not SPU ratepayers. Those expenditures did not have a sufficiently close nexus to a legitimate utility purpose to constitute lawful expenditures of utility funds.

19. SPU may permissibly purchase art or fund art projects to beautify its own offices and customer service facilities, but it may not lawfully fund art that is displayed in other City offices or in permanent or traveling public exhibitions. SPU may not lawfully expend utility funds to purchase art or fund art projects that have the primary purpose of improving SPU's image in a particular neighborhood or community, or cultivating public relations. SPU may not lawfully spend utility funds for the purpose of mitigating an SPU facility's appearance, when the primary purpose of the art is to provide artistic benefit to the surrounding neighborhood and the public as a whole. The Office of Arts and Cultural Affairs

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may not lawfully spend SPU funds on art or art projects that SPU could not lawfully fund itself.

20. The City's One Percent For Art ordinance, SMC Ch. 20.32, is invalid as applied to SPU.

21. In *Okeson* the trial court made findings of fact and conclusions of law as to the expenditure of City Light funds under the 1% for Art program that were virtually identical to the allegations set forth above in paragraphs 17 through 20 as to the expenditure of SPU funds under that program. Those findings and conclusions should be made as to SPU in this case for essentially the same reasons they were made as to City Light in *Okeson*.

22. Requiring SPU and its ratepayers to bear the costs of SPU's expenditures for art, under the 1% for Art program or otherwise, for general governmental purposes rather than legitimate SPU utility purposes illegally imposes on them general governmental costs that properly should be borne by the City's general fund rather than by SPU and its ratepayers.

23. Requiring SPU and its ratepayers to pay for art not having a sufficiently close nexus to a legitimate SPU utility purpose constitutes the unlawful imposition of a hidden tax on the ratepayers.

24. The City's requiring SPU to pay for art, through the 1% for Art program or otherwise, primarily benefiting the public or the City's general government or other City departments rather than the SPU utility itself constitutes a violation of the local government accounting statute, RCW 43.09.210, which (1) requires the City to pay SPU for the "true and full value" of any property or service provided by SPU to the City and (2) prohibits the

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City from benefiting "in any financial manner whatever" by an appropriation or fund made for the support of SPU.

IV. SEATTLE HAS ILLEGALLY REQUIRED SPU RATEPAYERS TO BEAR THE FINANCIAL BURDEN OF THE CITY'S GENERAL GOVERNMENTAL, VOLUNTARY SUPPORT FOR SOUND TRANSIT THROUGH THE RAINIER VALLEY COMMUNITY DEVELOPMENT FUND

25. In November 1999 the board of directors of the Central Puget Sound Regional Transportation Authority ("Sound Transit") adopted a resolution for establishment of a $50 million Community Development Fund ("CDF") to "increase transit ridership" on light rail and "to address the impacts of" light rail construction and operation, with the cost of the CDF to be offset, "to the extent possible," by contributions from Seattle and King County. In January 2000 the Federal Transit Administration ("FTA") required that Sound Transit establish the CDF as a mitigation condition of environmental approval for Sound Transit's light rail project.

26. In June 2000 the City adopted Ordinance 119975 authorizing the mayor to execute an agreement between the City and Sound Transit to allow the non-exclusive use of certain Seattle streets and rights-of-way (the "ROW Agreement") for Sound Transit's Central Link Light Rail Project. Seattle and Sound Transit entered into the ROW Agreement in July 2000. Section 3.5 of the ROW Agreement provided that, in connection with the construction of Sound Transit's light rail project, (i) the City would direct non-City-owned utilities to relocate, at their own expense, their facilities located within public rights of way as necessary to accommodate construction or operation of light rail but (ii) as to City-owned utilities, "the parties agree that Sound Transit shall pay for any relocation or protection of

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City-owned utilities that the City determines is necessary due to construction or operation of the Light Rail Transit System."

27. On June 13, 2002 the City and Sound Transit entered into an agreement (the "Community Development Fund Agreement," or "CDF Agreement") pursuant to which Seattle would contribute $42.8 million and King County would contribute $7.2 million to the CDF. Under the CDF Agreement Seattle's $42.8 million contribution would consist of (i) $21.3 million in "direct support" (cash) to the CDF and (ii) $21.5 million in "utility support" work for Sound Transit's light rail project, the value of such "utility support" work to be deemed an offset against Seattle's commitment to provide a $42.8 million contribution to the CDF. The CDF agreement contemplated that City Light would provide $17.5 million worth of "utility support" work for the Sound Transit project and SPU would provide $4 million worth of such "utility support" work. Section 4.2.1.7 of the CDF Agreement provided that Seattle "waived" and "released" Sound Transit from its obligations under Section 3.5 of the July 2000 ROW Agreement (to pay for any relocation or protection of City-owned utilities necessitated by the light rail project) to the extent of $21.5 million.

28. Pursuant to the CDF Agreement, SPU has already provided and is continuing to provide substantial and valuable "utility support" work for the benefit of the light rail project pursuant to that Agreement.

29. As intended by the City, the net effect of this arrangement is that SPU has been and is continuing to be required to perform work for the light rail project, the value of which is being offset against the City's commitment to provide contributions to the CDF, without receiving any compensation, reimbursement or other payment for such work from

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the City. Thus, regardless of whether Seattle's commitment to provide a $42.8 million contribution to the CDF is valid and enforceable, and regardless of whether Seattle's purported waiver and release of Sound Transit's obligation under the ROW Agreement to pay for necessary relocation and protection of utility facilities and equipment of City-owned utilities such as City Light and SPU is valid and enforceable, the City's agreement to use SPU as a means of discharging the City's commitment to Sound Transit, without paying to SPU the "true and full value" of such "utility support" work, constitutes a violation of the local government accounting statute, RCW 43.09.210.

30. Moreover, the effect of this arrangement is to shift a substantial portion of the expense of Seattle's CDF contribution from the City's general fund to SPU and to SPU ratepayers, and is illegal for the same reasons Seattle's attempt to shift street lighting expenses from the general fund to the Light Fund was held illegal in *Okeson*. In particular, the arrangement described above is functionally equivalent to, and constitutes, illegal imposition of an unauthorized and unconstitutional tax on City Light ratepayers.

31. The City contends that under the common law and section 15.32.120 of the Seattle Municipal Code, SPU is obligated to do the utility relocation work referred to above without receiving any compensation for such work.

32. Neither the common law principles alluded to by the City, nor SMC 15.32.120, applies to the SPU utility relocation work, because those principles and that Code provision do not apply where the utility relocation work is not being done for a City project but rather for the benefit of an outside entity or agency such as Sound Transit.

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33. To the extent those common law principles or that Code provision are deemed applicable to the SPU utility relocation work for the Sound Transit project, they are preempted by, or are otherwise invalid because they conflict with applicable law (including the local government accounting statute, RCW 43.09.210) and contractual provisions.

V. CLASS ACTION ALLEGATIONS

34. The class is composed of all persons who are or were at any time since March 1, 2002 ratepayers of SPU, except for defendant The City of Seattle. All class members have been affected adversely by the City's unlawful actions described above.

35. The class is so numerous that joinder of all members is impracticable. There are more than 300,000 members of the class.

36. There are numerous questions of fact or law that are common to the class, including the following:

a. Whether the City may lawfully require SPU to provide fire hydrant services and water for other non-utility public uses without compensation, and, if not, what costs for such services have been imposed unlawfully on SPU and its ratepayers, and whether SPU and its ratepayers are entitled to refunds for amounts paid for such unlawfully imposed costs;

b. Whether the City may lawfully require SPU to participate in the 1% for Art program, and, if not, what payments under that program have been imposed unlawfully on SPU and its ratepayers, and whether SPU and its ratepayers are entitled to refunds for such payments;

c. Whether the City's requiring SPU to provide $4 million worth of utility

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relocation work for purposes of Sound Transit's light rail project without compensation for such work constitutes an unlawful violation of RCW 43.09.210 and an unlawful imposition of a tax on SPU and its ratepayers, and, if so, whether the City must pay SPU for the true and full value of such work performed to date and whether SPU's ratepayers are entitled to refunds for costs of such work incurred to date;

d. Whether the ratepayers are entitled to declaratory and injunctive relief declaring the City's actions described above unlawful and prohibiting the City from further or continuing unlawful conduct as described above; and

e. Whether plaintiffs are entitled to an award of attorney fees and expenses incurred in this action.

37. The claims of the named plaintiffs as class representatives are typical of the class members generally, because the City's unlawful conduct described above has affected each of them in the same manner as the class members generally.

38. The class representatives will fairly and adequately represent the interests of the class, because:

a. The interests of the named plaintiffs in prosecuting their claims against the City are identical, except as to amount, to the interests of the class members; and

b. The named plaintiffs are well qualified by background, experience and knowledge to prosecute the action, and they have retained experienced and competent counsel who are well familiar with municipal law and with class actions, including but not limited to counsel's representation of the plaintiffs and the class of City Light ratepayers in the *Okeson* action.

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39. Class certification is appropriate under CR 23(b)(1), because the prosecution of separate actions by or against individual ratepayers would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the City, and (b) adjudications with respect to individual ratepayers which would as a practical matter be dispositive of the interests of the other ratepayers not parties to the adjudications or substantially impair or impede their ability to protect their interest.

40. Class certification is appropriate under CR 23(b)(2), because the City has acted or refused to act on grounds generally applicable to all ratepayers, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class of ratepayers as a whole.

41. Class certification is appropriate under CR 23(b)(3), because (a) the questions of law or fact common to all ratepayers who are members of the class predominate over any questions affecting only individual ratepayers, and (b) a class action is superior to other available methods for the fair and efficient adjudication of the controversy between the parties.

VI. RELIEF TO WHICH PLAINTIFFS AND OTHER SPU RATEPAYERS ARE ENTITLED

42. There is an actual, present and existing dispute between the parties concerning (a) the legality of the City's acts and practices described above, (b) plaintiffs' right to injunctive relief prohibiting the City from further or continuing the unlawful acts and practices described above, (c) SPU's right to receive full payment from the City for the utility services described above and refunds or reimbursement by the City for funds paid by SPU for art for general governmental or other non-utility purposes, and (d) the ratepayers' right to

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obtain refunds of amounts paid by them through rates to cover costs or expenses of SPU that should not have been incurred or should have been reimbursed or borne by the City's general fund or other City departments. Accordingly, plaintiffs are entitled to declaratory relief on these matters.

43. Plaintiffs have no adequate remedy at law and are entitled to injunctive relief as to the matters described above.

44. By its illegal acts described above, Seattle has unlawfully caused SPU to incur and pay costs and expenses that should have been borne by the City's general fund or others, and has unlawfully caused plaintiffs and other class members to incur and pay overcharges, including taxes, for utility services, and the City's general fund has been unjustly enriched. SPU, and in turn plaintiffs and the class, are entitled to recover from the City the full amount of all such costs and expenses unlawfully imposed on them, together with interest (or other compensation for loss of use of funds) thereon, pursuant to RCW 80.04.440 and general principles of law and equity. Furthermore, the City should be required to disgorge all amounts by which its general or other funds have been unjustly enriched, including any interest or earnings thereon.

45. Plaintiffs are entitled to an award of attorney fees and expenses from the City's general or other funds pursuant to RCW 80.04.440 and the common fund doctrine.

WHEREFORE, plaintiffs pray for judgment against Seattle as follows:

1. Declaring that (a) the City's actions in requiring SPU to provide fire hydrant services and water for other non-utility public uses without full compensation were and are unlawful, (b) the City's 1% for Art ordinance is unlawful as applied to SPU and the City's

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actions in requiring SPU to provide funding for art used for general governmental or other non-SPU purposes were and are unlawful, and (c) the City's actions in requiring SPU to perform utility relocation or other work for the benefit of Sound Transit without fully reimbursing SPU or without requiring Sound Transit to fully reimburse SPU for such work, were and are illegal;

2. Prohibiting SPU from (a) providing the City with any further fire hydrant services or water for other public, non-utility uses without full compensation, (b) providing any further funding for art for general governmental or other non-utility purposes, or (c) providing any further work for the benefit of Sound Transit without obtaining full reimbursement from the City or Sound Transit;

3. Requiring the City to fully reimburse SPU for (a) any fire hydrant services or water for public, non-utility uses provided to date by SPU, (b) any funding provided to date by SPU for art for general governmental or other non-utility purposes, and (c) any heretofore unreimbursed utility relocation or other work done to date by SPU for the benefit of the Sound Transit light rail project;

4. Awarding damages to plaintiffs and the class members in the amount of overcharges incurred and paid by them resulting from the City's unlawful acts and practices described above;

5. Awarding plaintiffs their reasonable attorney fees, expenses and costs incurred in this action; and

6. Awarding plaintiffs and the class such other and further relief as may be just, equitable and proper.

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Dated this 1ST day of March, 2005.

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